STATE OF MICHIGAN

COURT OF APPEALS

JOHNNY FOUNTAIN,

Plaintiff-Appellant,

V

CHIPPEWA COUNTY ROAD COMMISSION,

Defendant-Appellee.

UNPUBLISHED
December 3, 2002

No. 235625
Chippewa Circuit Court
LC No. 99-004083-CK

Before: Hood, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition and denying plaintiff's motion for summary disposition. We affirm.

Plaintiff began employment with defendant in 1971. During the course of his employment, plaintiff was represented by a local union. The agreement between the union and defendant contained the following provision regarding benefits for retirees:

> The Employer agrees to pay the full cost of hospitalization for retirees, and their dependents, who retire after February 1, 1985, until employee death, however, the Vision and Dental Plans for these retirees will no longer be paid for by the Employer. After the time of retiree's death, the dependent shall pay 100% of the cost if they elect to stay in the group.
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> Section 2. The Employer shall provide a group retirement program under the Michigan Municipal Employees' Retirement System which is the B-2 Plan with Benefit Program F55/25 rider.

On April 3, 1998, plaintiff ended his employment with defendant after twenty-five years of service. Plaintiff was forty-five years of age at the time of his departure and characterized his separation as retirement. Defendant characterized the separation as a "quit" or voluntary termination. Plaintiff began employment with his father's business, but sought health benefits from defendant pursuant to the terms of the collective bargaining agreement's retirement provision. Defendant rejected the request, contending that the benefit program was invoked when a retiree achieved both twenty-five years of service and fifty-five years of age.

The collective bargaining agreement expired on January 31, 1998, prior to plaintiff's departure. Defendant and the union subsequently reached a new agreement that apparently had not been ratified when plaintiff departed. That agreement[1] did not modify the provision addressing retiree benefits. A grievance was filed on plaintiff's behalf by the union. However, there is no indication that the grievance was pursued to full exhaustion of available remedies. Rather, the union challenged defendant's contention that retirement benefits were available upon fulfillment of both years of age and service conditions, alleging that defendant had made unilateral changes to the newly negotiated bargaining agreement. The Michigan Employment Relations Commission (MERC) dismissed the unfair labor practice charge raised by the union. Plaintiff filed this litigation alleging breach of contract, promissory estoppel, and age discrimination. The trial court denied plaintiff's motion for summary disposition and granted defendant's motion for summary disposition.[2]

Plaintiff first alleges that the trial court erred in granting summary disposition of his promissory estoppel claim. We disagree. An appellate court reviews the grant or denial of a motion for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The moving party has the initial burden to support its claim to summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate that a genuine issue of disputed fact exists for trial. *Id*. To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id*. Affidavits, depositions, and documentary evidence offered in opposition to a motion shall be considered only to the extent that the content or substance would be admissible as evidence. MCR 2.116(G)(6); *Maiden, supra*. An affidavit consisting of mere conclusory allegations that are devoid of detail are insufficient to demonstrate that there is no genuine issue of material fact for trial. See *Quinto, supra* at 371-372.

The elements of a claim of promissory estoppel are: (1) a promise; (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee; (3) which in fact produced reliance or forbearance of that nature; and (4) in circumstances such that the promise must be enforced if injustice is to be avoided. *Booker v City of Detroit*, 251 Mich App 167, 174; 650 NW2d 680 (2002). The promise must be definite and

[1] Defendant and the union disputed whether the agreement had been ratified. The union insisted that the agreement had been ratified because they had "shook" on it. Defendant asserted that the finalized agreement had not reduced to writing because of a clerical vacation and had not been submitted for final approval when the dispute regarding the application of retiree benefits was raised through plaintiff's grievance.

[2] On appeal, plaintiff does not challenge the dismissal of the breach of contract claim. We note that the trial court also concluded that plaintiff's promissory estoppel claim could be characterized as an unfair labor practice claim within the exclusive jurisdiction of MERC. See *Ramsey v City of Pontiac*, 164 Mich App 527, 537-539; 417 NW2d 489 (1987). This may be true. However, because the circumstances regarding the lack of continued progress of the grievance and any bad faith by the union is not contained in the appellate record, we have elected to address the merits of the promissory estoppel claim.

clear. *Id*. To determine whether the requisite promise was made, this Court objectively examines the words and actions surrounding the transaction in question as well as the nature and circumstances of the parties' relationship. *Novak v Nationwide Mutual Ins Co*, 235 Mich App 675, 687; 599 NW2d 546 (1999). The doctrine of promissory estoppel should be applied only when the facts are unquestionable and the wrong to be prevented undoubted. *Id*.

Review of the record reveals that plaintiff failed to establish the elements of promissory estoppel. Testimony before the commission revealed that the insurance provision had been in effect since 1952. During negotiations for the new bargaining agreement, defendant's representatives testified that the union requested retiree benefits after twenty-five years of service without any age restrictions and that request was flatly denied. In fact, the vice president of the union testified that the request for retirement benefits after twenty-five years of service was rejected by defendant. Additionally, plaintiff's deposition testimony and affidavit failed to demonstrate a clear and definite promise.[3] Rather, plaintiff acknowledged that road commission workers could not agree whether qualification for retirement benefits was contingent upon years of service alone. Accordingly, the trial court did not err in granting defendant's motion for summary disposition of this claim. *Booker, supra; Quinto, supra*.

Plaintiff next alleges that the trial court erred in granting summary disposition of his age discrimination claim under the Michigan Civil Rights Act (MCRA), MCL 37.2101 *et seq*. We disagree. The MCRA provides an exception for the "establishment or implementation of a bona fide retirement policy or system that is not a subterfuge to evade the purposes of this section." MCL 37.2202(2). A bona fide retirement policy is one that exists and pays benefits. *Zoppi v Chrysler Corp*, 206 Mich App 172, 177; 520 NW2d 378 (1994), overruled in part on other grounds, *Zanni v Medaphis Physician Services Corp*, 240 Mich App 472; 612 NW2d 845 (2000). It is undisputed that defendant has a retirement plan that exists and pays health benefits. Accordingly, the trial court did not err in granting summary disposition of the age discrimination claim.

Affirmed.

/s/ Harld Hood
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell

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[3] We note that, although plaintiff abandoned his breach of contract claim, he asserts on appeal that a definite and clear promise was established as evidenced by the written contract and personnel manual. Because there was a written contract, there can be no implied contract, and thus no recovery for unjust enrichment or promissory estoppel. See *Martin v East Lansing School District*, 193 Mich App 166, 177-180; 483 NW2d 656 (1992). Thus, we have addressed the alleged oral statements or negotiations that allegedly resulted in health benefits to retirees with only twenty-five years of service.